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HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

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OF THE SUPREME COURT OF ARIZONA

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,

RONALD G. SALTSMAN, Bar No. 004512

RESPONDENT

No.: 05-1650

**HEARING OFFICER'S REPORT** 

#### PROCEDURAL HISTORY

The State Bar filed a formal complaint on April 24, 2006. Respondent filed an answer on May 22, 2006.

A settlement conference was held on July 25, 2006 at which time the parties reached an agreement.

A Tender of Admissions and an Agreement for Discipline by Consent and Joint Memorandum in support of the Tender of Admissions and Agreement for Discipline by Consent (joint memo) was filed on August 29, 2006.

On September 21, 2006, a telephonic hearing was conducted on the settlement by Hearing Officer 7R.

#### FINDINGS OF FACT

- 1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice on June 22, 1976.
- 2. On September 13, 2005, the State Bar of Arizona received an insufficient funds notice on Respondent's Trust Account.
- 3. The bank notice revealed that checks in the amount of \$13,949.63 and \$20.00 were presented to the bank when the balance in the trust account was \$13,958.62.
- 4. The bank assessed an overdraft fee of \$60.00 which resulted in a negative trust balance.
  - 5. The bank ultimately reversed the \$60.00 overdraft charge.
- 6. The Respondent stated that the \$13,949.63 check was a payment pursuant to a settlement; however, the check was not deposited in the trust account until the next day which caused an overdraft of the trust account.
- 7. The State Bar's staff examiner performed a review of the Respondent's records which then revealed other irregularities in the trust account.
- 8. On August 12, 2005, the Respondent deposited a settlement check in the amount of \$5,600.00.
- 9. On August 12, 2005, the Respondent disbursed funds to himself for attorney fees and \$3,874.50 to his client.
- 10. On August 18, 2005, the bank advised the Respondent that the check for \$5,600.00 was returned because of improper endorsement. The bank deducted the \$5,600.00 from Respondent's trust account.

- 11. The funds held in trust on behalf of the client were disbursed prior to actually being available for disbursement which resulted in a negative conversion of funds.
- 12. On August 4, 2005, the Respondent disbursed funds from his trust account to a client in the amount of \$8,673.49 when the client did not have funds held in trust..
- 13. On August 12, 2005, the Respondent deposited a settlement on behalf of his client in the amount of \$13,103.98.
- 14. The funds were disbursed in accordance with the settlement agreement.
- 15. Respondent paid out \$0.16 more on behalf of the client than was held in trust.
- 16. Respondent's conduct in this matter resulted in potential injury to other clients' funds.
- 17. On September 8, 2005, the Respondent disbursed checks to another client in the sum of \$1,583.00 and \$2,890.00 when the client had no funds in the trust account.
- 18. On September 12, 2005, the client actually received the settlement check and deposited it in his trust account in the amount of \$4,600.00.
- 19. Respondent paid funds from his trust account prior to the funds being available for disbursement.
- 20. Respondent's conduct in this matter caused potential injury to other clients' funds.

- 21. On May 31, 2005, Respondent disbursed a check to another client in the amount of \$5000.00 when the client did not have funds in the trust account.
- 22. Respondent deposited a settlement check the following day in the amount of \$100,000.00 in trust for his client. Therefore, Respondent paid funds from the trust to a client prior to the funds actually being available.
- 23. Respondent's conduct in this matter caused potential injury to other clients' funds.
- 24. On September 27, 2005, the Respondent deposited in his trust account the amount of \$7,973.77. Respondent failed to record this transaction in his trust account general ledger.
- 25. On August 25, 2005, Respondent disbursed checks to a client in the sum of \$14,493.94 and \$13,961.49.
- 26. On August 26, 2005, Respondent deposited into his trust account a settlement check on behalf of his client in the amount of \$75, 500.00.
- 27. This disbursement occurred before there were funds in the trust account on behalf of the client, therefore resulting in potential injury to other clients' funds.
- 28. In response to a request by the State Bar, Respondent stated that he did not maintain actual client ledgers. He maintained only settlement proceeds disbursed.
- 29. The documents do not reflect a running total of clients' funds maintained in the trust on any given date and, therefore, is not in compliance with the trust account rules.

- 30. The documents reflect only the amount of settlement in the itemized disbursements of same.
- 31. As a result of the review of the Respondent's trust account, it was determined that he did not maintain adequate trust account records and failed to properly safeguard clients' funds which resulted in the trust account being overdrawn.
- 32. Respondent also failed to exercise professional care in the performance of his duties as required by Rule 43(d)(1)(A) and (d)(1)(B) regarding the overdraft and other record keeping violations.
- 33. Respondent failed to maintain internal office controls that are adequate to safeguard funds or other property held in trust in accordance with Rule 43(d)(1)(C).
- 34. Respondent failed to maintain individual client ledgers or other ledgers including an adequate general ledger or check register or anything of the equivalent in which to record transactions.
- 35. Respondent failed to maintain or caused to be maintained an account ledger or the equivalent for each client, violating Rule 43(d)(2)(C).
- 36. Respondent failed to complete a three-way reconciliation of clients' ledger, trust account, general ledger, or register and trust account bank statement as required by Rule 43(d)(2)(D).
- 37. Respondent also failed to safeguard clients' funds and failed to comply with the trust account guidelines.
- 38. Respondent's overall conduct as described above violates Rule 42 Ariz. R.S.Ct., ER 1.15 and Rules 43 and 44.

#### **CONDITIONAL ADMISSIONS**

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42 of the Ariz. R.S.Ct., specifically ER 1.15 and Rules 43 and 44. Respondent's admissions are being tendered in exchange for the form of discipline reached by the parties in the Tender of Admissions and Agreement for Discipline by Consent.

#### **CONCLUSION OF LAW**

By agreeing to this Agreement, Respondent waives his right to a formal disciplinary hearing pursuant to Rule 53(c)(6), Ariz. R.S.Ct. Furthermore, Respondent received the assistance of counsel during these proceedings and acknowledged that he read and understood the Agreement and submits this Agreement with the conditional admissions freely and voluntarily and without coercion or intimidation.

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, 43, and 44, Ariz. R.S.Ct., and ER 1.15, because of his failure to properly safeguard clients' funds, exercise professional care in the maintenance of his clients' trust accounts, to record all client funds accounts properly, and maintain proper client trust account records. More specifically, the Respondent disbursed funds from two clients from the trust account prior to receiving and/or depositing settlement funds for those clients, as well as failure to conduct a monthly three-way

reconciliation. Furthermore, the Respondent maintained personal funds in the trust account in excess of the amount needed to pay administrative fees.

#### **ABA STANDARDS**

The Supreme Court and the Disciplinary Commission consistently use the Standards to determine appropriate sanctions for attorney discipline. See In re Clark, 207 Ariz. 414, 87 P.3d 827 (2004); In re Peasley, 427 Ariz. Adv. Rep. 23, 90 P.3d 764, §§ 23m 33m (2004). The Standards are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying those factors to situations in which lawyers have engaged in various types of misconduct. Standard 1.3, Commentary.

In determining an appropriate sanction, the court and the Disciplinary Commission considers the duty violated, the lawyer's mental state, the presence or absence of actual or potential injury, and the existence of aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990); *Standard* 3.0.

Given the conduct in this matter, it is appropriate to consider Standard 4.0 (Violations of Duties Owed to the Client). Standard 4.0 provides, in relevant part:

## 4.1 Failure to Preserve Client's Property

4.13: Reprimend (censure in Arizona) is generally appropriate when a lawyer is negligent in dealing with client

property and causes injury or potential injury to a client.

The parties agree that Respondent's mental state was negligent rather than knowing. Therefore, the parties agree that censure is the presumptive sanction.

After determining the presumptive sanction, it is appropriate to evaluate aggravating and mitigating factors enumerated in the *Standards* that would justify an increase or decrease in the presumptive sanction. See *In re Scholl*, 200 Ariz. 222, 225-26, ¶ 20, 25 P.3d, 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891 P. 2d 236, 239 (1995).

#### THE DUTY VIOLATED

Respondent violated duties to his clients by not observing the rules governing the treatment of client fund by an attorney. These rules are designed to ensure that a client's money is not put in jeopardy, used or taken improperly by the client's attorney. Although Respondent asserts that he was merely negligent in failing to realize that his treatment of client funds was improper, he had an affirmative duty to familiarize himself with the rules governing his law practice in Arizona. In addition, Respondent violated his duty to clients by failing to act with reasonable diligence and promptness in maintaining appropriate records relating to their representation. Respondent violated his duty to the legal system and to the profession by failing to comply with the ethical rules, in particular the trust account rules. Respondent

admits that his conduct has violated his duty to clients, the profession, and the legal system.

#### THE LAWYER'S MENTAL STATE

The parties agree that Respondent was negligent in failing to be aware of, familiarize himself with, and comply with the rules governing the treatment of client funds by attorneys.

## THE POTENTIAL OR ACTUAL INJURY CAUSED BY RESPONDENT

There was potential injury to clients as a result of Respondent's rule violations. Respondent's failure to comply with the rules governing treatment of client funds exposed his clients to potential injury by causing the funds to be held without protections against intentional or inadvertent misdirection or depletion that are provided through strict compliance with ER 1.15 and Rules 43 and 44, Ariz. R.S.Ct.

#### AGGRAVATING AND MITIGATING CIRCUMSTANCES

The presumptive sanction for a negligent infraction of this nature is a censure; the presumptive sanction for a knowing violation is suspension. The presence of aggravating and mitigating factors assists in determining which sanction applies.

The parties agree that three aggravating factors should be considered:

Standard 9.22(a) (prior disciplinary offenses): In 1983, Respondent received a censure in File No. 81-1-5N for violations of DR 102(A)(6), DR 6-

 101(A)(3), DR 7-101(A)(2), (3), and (8), Rule 29(b), Ariz. R.S.Ct. and A.R.S. § 32-267(3). In 1986, Respondent received an informal reprimand for violating DR 1-102(A)(5);

Standard 9.22(c) (pattern of misconduct);

Standard 9.22(i) (substantial experience in the practice of law): Respondent was admitted to the practice of law in Arizona on June 22, 1976;

The following factors should be considered in mitigation:

Standard 9.32(b) (absence of a dishonest or selfish motive):
Respondent did not act out of any dishonest or selfish motive and believed he was assisting his clients. The parties agree that Respondent's state of mind in the misconduct was negligent;

Standard 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings): Respondent admitted that he had mismanaged his trust account and cooperated with the State Bar during the trust account investigation and exchange of information and records;

Standard 9.32(m) (remoteness of prior offenses): Respondent's prior offenses occurred in 1983 and 1986 and should be given little weight when determining the appropriate sanction in this matter.

Having considered the above, this Hearing Officer agrees with the parties that the aggravating and mitigating factors do not warrant a departure from the presumptive sanction of a censure in this case.

### PROPORTIONALITY ANALYSIS OF ANALOGOUS CASES

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*, 202 Ariz. At 35, ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to each case. *Id*, at 208 Ariz. at 41, ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, ¶ 49, 41, P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983).

The most serious instance of misconduct in this case involves Respondent's failure to be aware of, familiarize himself with, and comply with, the rules governing the treatment of client funds. The following cases are instructive concerning these types of misconduct.

In In re Davis, Davis received a censure with one year of probation for violations of trust account rules. Davis failed to properly safeguard client funds, failed to hold property of clients separate from his own property, failed to exercise due professional care in the maintenance of his client trust account and failed to properly supervise employees or others assisting in the performance of his duties under the trust account guidelines. He also failed to maintain proper internal controls, record all transactions promptly and completely, failed to maintain records, failed to maintain an account ledger and failed to conduct monthly reconciliations of the trust account.

Davis' conduct was found to be negligent with potential injury to his clients. There were three aggravating factors present: a pattern of

 misconduct; multiple offenses; and substantial experience in the practice of law. There were also five mitigating factors present: absence of a prior disciplinary record; absence of dishonest or selfish motive; timely good faith effort to make restitution or to rectify consequences of misconduct; and full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

In this case, Respondent has similar trust account violations. However, the aggravating factors such as a pattern of misconduct or multiple offenses are absent from this case. Similarly, the mitigating factor of timely good faith effort to make restitution or to rectify consequences of misconduct is also inapplicable to Respondent's case.

In In re Wicks, SB-05-0140 (2005), Wicks received a censure with one year of probation for violations of trust account rules. Wicks failed to properly safeguard client funds, failed to exercise due professional care in the maintenance of his client trust account, and failed to keep his funds separate from that of his clients by depositing earned client funds into the trust account. He also failed to maintain complete trust account records for a period of five years, failed to maintain proper internal controls, failed to record all transactions to the trust account promptly and completely, and failed to conduct monthly reconciliations of the trust account.

Wick's conduct was found to be negligent with potential injury to his clients. There were two aggravating factors present: prior disciplinary offenses and substantial experience in the practice of law. There were three

mitigating factors present: absence of dishonest or selfish motive; full and free disclosure to disciplinary board or cooperative attitude toward proceedings and; remoteness of prior offenses. In this case, Respondent has similar trust account violations, without the aggravating factor present of substantial experience in the practice of law and without the mitigating factor present of timely good faith effort to make restitution or to rectify consequences of misconduct.

In In re Goff, SB-01-0152-D (2001), Goff received a censure with two years of probation. Goff had three trust account violations for checks drawn on his account resulting in a negative balance, and he commingled his personal funds with trust account funds. Although there was no evidence of actual harm to a client, the attorney did not properly identify his trust account, did not keep a correct running balance of old journal or register transactions, and did not have individual client ledgers. In addition, he paid his bar dues, phone bills and other personal expenses with trust account funds. The Disciplinary Commission unanimously recommended acceptance of the agreement and joint memorandum noting that ABA Standard 4.13 allowed for reprimand (censure) where an attorney was negligent in dealing with client property.

In this case, Respondent failed to properly safeguard client funds, exercise due professional care, record all transactions promptly and completely, maintain proper trust account records and make all trust account disbursements by p re-numbered check or electronic transfer.

The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender." In *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966). This Hearing Officer believes that the sanctions proposed are consistent with these principles.

#### RECOMMENDATIONS

- That Respondent receive a public censure for violating Rule 42,
   Ariz. R.S.Ct., specifically ER 1.15 and Rules 43 and 44, Ariz. R.S.Ct.
- 2) That Respondent be placed on probation for a period of one year, under the following terms and conditions:
  - a) Respondent shall contact the director of the State Bar's Law Office Management Assistance Program ("LOMAP") within 30 days of the final judgment and order. Respondent shall submit to a LOMAP audit of his office's trust account procedures. The director of LOMAP shall develop a probation contract, and its terms shall be incorporated herein by reference. The probation period will begin to run at the time of the judgment and order, and will conclude one year from the date that Respondent signs the probation contract;
  - b) Respondent shall complete the TAEEP within six months of the final judgment and order. To schedule his attendance, Respondent shall contact Barbara Chandler at (602) 340-3278;
  - c) Respondent shall participate in the TAP for a period of at least one year, unless the TAP administrator deems that his participation for one year is unnecessary. To schedule his participation, Respondent shall contact Barbara Chandler at (602) 340-3278;

- 3) That Respondent pay all costs and expenses incurred in the disciplinary process in this amount of \$1151.25.
- 4) In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives notice of his failure, bar counsel will file a Notice of Non-Compliance with the disciplinary clerk. A hearing officer will conduct a hearing at the earliest practical date, but in no event not later than 30 days following receipt of notice, and will determine whether the terms have been breached and, if so, recommends appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by clear and convincing evidence.

RESPECTFULLY SUBMITTED this

day of October, 2006.

7. H. Guerin, Jr. Hearing Officer 7R

Original mailed this <u>M</u> day of October, 2006 to:

Disciplinary Clerk's Office Supreme Court of Arizona 1501 W. Washington, Ste. 104 Phoenix, AZ 85007-3231

Copy of the foregoing mailed this \( \frac{1}{2} \) day of October, 2006 to:

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